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No. 82-2085

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

JOINT COUNCIL OF TEAMSTERS NO. 42, AND ITS AFFILIATED LOCAL UNIONS, SALES DRIVERS & DAIRY EMPLOYEES, LOCAL 166; GENERAL TRUCK DRIVERS, LOCAL 235; GENERAL TRUCK DRIVERS, CHAUFFEURS & HELPERS, LOCAL 692; CHAUFFEURS, TEAMSTERS AND HELPERS, LOCAL 186; BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 420; GENERAL TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS, LOCAL 982; TRUCK DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL 898; TEAMSTERS & WAREHOUSEMEN, LOCAL 381, ALL AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA' TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 87, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

(Cover Continued On Inside Front Cover)

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Intervenor,

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

BUILDING MATERIAL AND DUMP TRUCK DRIVERS, LOCAL 420, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AND ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC., ENGINEERING CONTRACTORS ASSOCIATION, INC., SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION,

Respondents.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC., ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Intervenors.

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

Intervenor.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review the decision of the Ninth Circuit Court of Appeals, affirming the holding of the National Labor Relations Board ("NLRB") that the status of dump truck owner-operators as independent contractors could not be relitigated pursuant to the doctrines of res judicata and collateral estoppel, where such issue had been fully litigated in a prior action involving the identical parties or their privies?

2. Where the NLRB, the Circuit Courts and the legislative history are all in accord with respect to the interpretation and application of the "construction industry proviso" of Section 8(e) of the National Labor Relations Act, as amended, do those circumstances present an important question of federal law which needs to be settled by this Court?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CASES, STATUTES AND OTHER AUTHORITIES	iii
INTRODUCTION	2
ARGUMENT	5
I. BOTH THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE NINTH CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT CONCUR IN THE NLRB'S DETERMINATION THAT THE OWNER-OPERATORS ARE INDEPENDENT CONTRACTORS WITHIN THE MEANING OF SECTION 2(3) OF THE ACT	5
II. THE DEFINITION OF THE PHRASE "THE SITE OF THE CONSTRUCTION" AT SECTION 8(e) OF THE ACT IS NOT "UNSETTLED" AND THE CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT	12
III. CONCLUSION	14

TABLE OF AUTHORITIES

Page(s)

Cases

Associated General Contractors of California, Inc. v. NLRB, 564 F.2d 271 (9th Cir. 1977) 6,7,9,10

Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 v. NLRB, 669 F.2d 759 (D.C. Cir. (1981) 8,9

Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 v. NLRB, 249 NRLB 386 (1980) 9

Contractor Members of the Associated General Contractors of California, Inc., 201 NLRB 311 (1973) 7,8

Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322 (D.C. Cir. 1971) 5,6,7

United Insurance Company of America v. NLRB, 272 F.2d 446 (7th Cir. 1959) 11

Statutes

Labor Management Relations Act, Section 2(3) (29 U.S.C. § 152(3) (1976) 4

Page(s)

Labor Management Relations Act, Section 8(e) (29 U.S.C. § 158(e) (1976) 4

United States Code, Title 28, Sec. 1254(1) 11

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Petitioners,

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NATIONAL LABOR RELATIONS BOARD, ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, INC., BUILDING INDUSTRY ASSOCIATION OF CALIFORNIA, INC., ENGINEERING CONTRACTORS ASSOCIATION, INC., SOUTHERN CALIFORNIA CONTRACTORS ASSOCIATION, ASSOCIATED INDEPENDENT OWNER-OPERATORS, INC.,

CALIFORNIA DUMP TRUCK OWNERS ASSOCIATION,

Respondents.

California Dump Truck Owners Association's Response to the Petition For a Writ of Certiorari.

INTRODUCTION

Although it is unnecessary to submit a complete re-statement of this case in this response, clarification of certain aspects of the Statement of the Case presented by the Petitioner may be helpful to the Court.

Essentially, there are four basic interests that are represented by the parties to this proceeding. Petitioner (hereinafter "Unions") obviously presents one view. The Associated General Contractors of California, Inc., The Building Industry Association of California, Inc., The Engineering Contractors Association, Inc. and the

Southern California Contractors Association (hereinafter "Employer Associations") represent another interest. The California Dump Truck Owners Association (hereinafter "CDTOA") is not aligned with either the Unions or the Employer Associations and presents the view of the owner-operators. Finally, the National Labor Relations Board (hereinafter "NLRB"), which is charged with responsibility for administration of the National Labor Relations Act, presents the final perspective.

In summary, as the case history recited in the petition for certiorari suggests, the Unions have been engaged in an effort for over a decade to either represent the dump truck owner-operators in California or alternately, to preclude them from the labor market in which they normally operate. The owner-operators have steadfastly

resisted those attempts. The Employer Associations, for their part, have simply been attempting to adopt whatever position they believe will cause the least interference with or potential disruption of their business operations.

The Unions seek certiorari in this case on the ground that there is an express conflict between the Ninth and District of Columbia Circuits as to whether dump truck owner-operators are employees or independent contractors within the meaning of Section 2(3) of the LMRA. 29 U.S.C. § 152(3). They also assert that the scope of the "construction industry proviso" to Section 8(e) of the LMRA presents an important issue which requires resolution by this Court. 29 U.S.C. § 158(e). It is respectfully submitted that there are no grounds for the petition as to either issue.

ARGUMENT

I. BOTH THE UNITED STATES CIRCUIT COURTS OF APPEALS FOR THE NINTH CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT CONCUR IN THE NLRB'S DETERMINATION THAT THE OWNER-OPERATORS ARE INDEPENDENT CONTRACTORS WITHIN THE MEANING OF SECTION 2(3) OF THE ACT

The Unions rely upon Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d 1322 (D.C. Cir. 1971), for the proposition that the owner-operators in the instant case have been held to be employees by the District of Columbia Circuit and that therefore, there is a conflict between the District of Columbia Circuit and the Ninth Circuit's more recent determination that the California dump truck owner-operators are independent contractors. Compare Associated General Contractors of Cali-

fornia, Inc. v. N.L.R.B., 564 F.2d 271 (9th Cir. 1977).

In the first instance the record presented to the Ninth Circuit in Associated General Contractors of California, Inc. was not the same record that the D.C. Circuit reviewed in its decision in 1971. Secondly, the D.C. Circuit did not conclude in its decision that the owner-operators were employees. Rather, it simply concluded that, based upon the record before it, it could not displace the NLRB's choice between what appeared to be two fairly conflicting views (employee vs. independent contractor status). Joint Council of Teamsters No. 42 v. NLRB, 450 F.2d at 1329. In short, the D.C. Circuit indicated its belief that it was a close question and that on the record before it, the Court would not substitute its judgment for that of the NLRB. It

should also be noted that there was a vigorous dissent filed in that case by Judge MacKinnon in which he indicated that he believed that on the facts presented the owner-operators were independent contractors. 450 F.2d at 1329-1334.

On a different record, the record generated in Contractor Members of the Associated General Contractors of California, Inc., 201 NLRB 311 (1973), the Ninth Circuit concluded that the NLRB had not chosen between two "fairly conflicting views" as to the dump truck owner-operators' status under the Act. The Ninth Circuit held that the NLRB was wrong in its determination that the owner-operators were employees and instead held that, based upon the record before it, they were independent contractors. Associated General Contractors of California, Inc. v. NLRB, 564 F.2d at 282.

Parenthetically, it is noteworthy that the record from the decertification proceeding in 1973 (Case No. 21-RD-1008) is a part of the record in the instant proceeding. Compare Pet., App. iv at 22, n.5, with Contractor Members of the Associated General Contractors of California, Inc., 201 NLRB 311 (1973).

Thus, there is no conflict between the two Circuit Courts who have addressed the issue as to whether the California dump truck owner-operators are independent contractors. Rather, on two separate records the two separate Circuit Courts of Appeal came to a different result as to the supportability of the Board's underlying determination on those different records.

Moreover, most recently in Building Material and Dump Truck Drivers Teamsters Local Union No. 36 v. NLRB, 669 F.2d 759 (D.C. Cir. 1981), aff'd on

other grounds sub nom. Shepard v. NLRB, ___ U.S. ___, 103 S. Ct. 665, 51 U.S.L.W., 4087 (U.S. January 18, 1983) (No. 81-1627), the D.C. Circuit affirmed the NLRB's determination in a parallel case in San Diego County that the dump truck owner-operators were independent contractors. 669 F.2d at 765. It should be noted that the underlying NLRB decision, sustained by the D.C. Circuit, is based at least in part upon the determination that the California dump truck owner-operators in Associated General Contractors of California, Inc. v. NLRB, 564 F.2d 271 (9th Cir. 1977), were independent contractors and not employees. Building Material and Dump Truck Drivers, Teamsters Local Union No. 36, 249 NLRB 386, 388 (1980). Accordingly, based upon the recent decisions in both the Ninth Circuit and the D.C. Circuit, there is complete accord between them

and with the NLRB that the dump truck owner-operators herein are independent contractors. Hence, there is no conflict between the circuits on this issue.

Finally, it must be noted that the Unions' assertion that it has been somehow denied due process, seems to be based upon an argument that this case presents the first opportunity that the Unions have had to seek resolution of the independent contractor issue. That is incorrect. The Unions were a party in Associated General Contractors of California, Inc. v. NLRB, 564 F.2d 271 (9th Cir. 1977), and to the underlying decertification proceedings. They fully litigated the issue before the NLRB and the Ninth Circuit. Moreover, as a party, the Unions would appear to have had standing to petition for certiorari

in 1977 had they chosen to do so. See 28 U.S.C. § 1254(1).

Finally, the Unions' reliance upon United Insurance Company of America v. NLRB, 272 F.2d 446 (7th Cir. 1959), is misplaced. There, the Seventh Circuit held that a prior NLRB determination of employee status reached in a representation proceeding could not substitute for evidence on such issue in a later unfair labor practice proceeding. Id. at 449. Here, the Unions were not denied the opportunity to submit new evidence. In fact, the Unions stipulated to the facts herein and have agreed that the record in the underlying decertification case "remains unchanged and applicable to the determination of the owner-operators' present employment status." Pet., App. iv at 22, n.5.

In short, there is no appropriate ground for the Union to assert

that this Court should grant certiorari on the issue whether the owner-operators are independent contractors or not. The determinations of the Ninth Circuit and the D.C. Circuit, as well as that of the NLRB, are now consistent and not in conflict. Review of any aspect of the Ninth Circuit's decision on that issue is neither necessary nor appropriate.

II. THE DEFINITION OF THE PHRASE "THE SITE OF THE CONSTRUCTION" AT SECTION 8(e) OF THE ACT IS NOT "UNSETTLED" AND THE CASE PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

In simple terms, the Unions attempt to assert that the interpretation of the so-called construction industry proviso to Section 8(e) of the Act is a matter that this Court needs to "settle." As is ably illustrated by the

citations set forth in the Ninth Circuit's decision, both the NLRB and the Circuit Courts of Appeal are in accord as to the proper interpretation of that proviso, as it applies to this case. Pet., App. iii at 6-7.

The Unions argue that because the owner-operators have historically been covered by successive MLA's the Court should "provide further guidance" because of the alleged congressional intent not to change practices within the construction industry by Section 8(e). The "historical" coverage extended to the owner-operators by successive MLA's to which the Unions refer has always been against the will of the owner-operators and unlawful. This "bootstrap" argument scarcely serves to convert this issue into an important question of federal law that this Court should settle. There is nothing to set-

tle. The Ninth Circuit merely applied the commonly held interpretation of the jobsite proviso to Section 8(e) of the Act.

III. CONCLUSION

For the foregoing reasons, the CDTOA respectfully requests that certiorari be denied.

Respectfully submitted,

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